Office-Supreme Court, U.S.
FILED
SEP 3 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1690

In the

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN MEDICAL ASSOCIATION, CONNECTICUT STATE MEDICAL SOCIETY, NEW HAVEN COUNTY MEDICAL ASSOCIATION, INC.,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN DENTAL ASSOCIATION IN SUPPORT OF PETITIONERS AMERICAN MEDICAL ASSOCIATION, CONNECTICUT STATE MEDICAL SOCIETY AND NEW HAVEN COUNTY MEDICAL ASSOCIATION, INC.

PETER M. SFIKAS
200 East Randolph Drive
Suite 7300
Chicago, IL 60601
(312) 861-1400
Counsel of Record

Of Counsel
CLAY H. PHILLIPS
JOHN N. SCHOLNICK
PETERSON, ROSS, SCHLOERB & SEIDEL
200 East Randolph Drive
Suite 7300
Chicago, IL 60601
(312) 861-1400

The Scheffer Press, Inc.—(312) 263-6850

TABLE OF CONTENTS

	PAGE
Table of Authorities	i
STATEMENT OF INTEREST AND STATEMENT OF CASE	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	5
The Language Of The Federal Trade Commission Act Precludes The Commission's Jurisdiction Over Non-Profit Professional Associations	5
The Legislative History Of The Federal Trade Commission Act Precludes The Commission's Jurisdiction Over Non-Profit Professional Associations	10
The Federal Trade Commission Has Acknowledged Its Lack Of Jurisdiction Over Non-Profit Professional Associations	15
Enforcement Of An Order In This Matter Is Not In The Public Interest	17
The Burden Should Not Be On The ADA To Petition The Commission To Lift Its Unnecessary Order	21
Conclusion	22
Appendix	1a

TABLE OF AUTHORITIES

CASES

	PAGE
American Dental Association, 94 F.T.C. 403 (1979)	20
American Medical Association, 94 F.T.C. 701 (1979), *aff'd*, 638 F.2d 443 (2d Cir. 1980)	20, 21

PAGE

American Medical Association v. *Federal Trade Commission*, 638 F.2d 443 (2d Cir. 1980) 20

American Veterinary Medical Association, 3 Trade Reg. Rep. (CCH) ¶10,439 (1981) 20

Associated Hospital Service, Inc. v. *City of Milwaukee*, 13 Wis.2d 447, 109 N.W.2d 271 (1961) 9

Bates v. *State Bar of Arizona*, 433 U.S. 350 (1977) 4, 18

Burns v. *Alcala*, 420 U.S. 575 (1975) 6

Community Blood Bank of Kansas City Area, Inc., 70 F.T.C. 728 (1966), *rev'd*, 405 F.2d 1011 (8th Cir. 1969) 7, 13

Community Blood Bank of Kansas City Area, Inc. v. *Federal Trade Commission*, 405 F.2d 1011 (8th Cir. 1969) 3, 7, 8, 9, 10

Federal Baseball Club of Baltimore v. *National League*, 259 U.S. 200 (1922) 18

Federal Trade Commission v. *Cement Institute*, 333 U.S. 683 (1948) 7

Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975) 4, 17, 18

Morissette v. *United States*, 342 U.S. 246 (1952) 6

National Society of Professional Engineers v. *United States*, 435 U.S. 679 (1978) 4

Old Colony R.R. Co. v. *Commissioner*, 284 U.S. 552 1932) 6

Perrin v. *United States*, 444 U.S. 37 (1979) 6

Semler v. *Board of Dental Examiners*, 294 U.S. 608 (1935) 18

United States v. *Oregon State Medical Society*, 343 U.S. 326 (1952) 20

PAGE

United States v. *Stewart*, 311 U.S. 60 (1940) 6

United States v. *W.T. Grant Co.*, 345 U.S. 629 (1953) 4, 19, 20

STATUTES AND LEGISLATIVE MATERIALS

15 U.S.C. §19 (1979) 20

15 U.S.C. §44 (1979) 5

15 U.S.C. §45 (1979) 5, 21

H.R.Rep. No. 1142, 63d Cong., 2d Sess. (1914) 10, 11, 13

H.R.Rep. No. 533, 63d Cong., 2d Sess. (1914) 3, 10, 12

S.Rep. No. 597, 63d Cong., 2d Sess. (1914) 10, 11, 12

H.R.Rep. No. 339, 95th Cong., 1st Sess. (1977) 17

To Investigate and Report Desirable Changes in the Laws Regulating and Controlling Corporations, Persons, and Firms Engaged in Interstate Commerce: Hearings on S.Res. 98 Before the Senate Comm. on Interstate Commerce, 62d Cong., 1st and 2d Sess. (1912) 11

Proposed Federal Trade Commission Amendments of 1977 and Oversight: Hearings on H.R. 3816 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess. (1977) 4, 15, 16

47 Cong. Rec. (1911) 11

51 Cong. Rec. (1914) 13, 14

OTHER AUTHORITIES

312 Trade Reg. Rep. 2 (December 19, 1977) 17

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1690

AMERICAN MEDICAL ASSOCIATION, CONNECTICUT STATE MEDICAL SOCIETY, NEW HAVEN COUNTY MEDICAL ASSOCIATION, INC.,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

BRIEF AMICUS CURIAE OF THE AMERICAN DENTAL ASSOCIATION IN SUPPORT OF PETITIONERS AMERICAN MEDICAL ASSOCIATION, CONNECTICUT STATE MEDICAL SOCIETY AND NEW HAVEN COUNTY MEDICAL ASSOCIATION, INC.

I.

STATEMENT OF INTEREST AND STATEMENT OF CASE

This Amicus Brief is being filed by consent of the parties.[1]

---

[1] Appendix (hereinafter App.) 1a-3a contains the parties' consent.

As stated previously in the Brief Amicus Curiae of the American Dental Association in Support of the Joint Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit,[2] the American Dental Association ("ADA") is an Illinois not-for-profit corporation with some 119,000 fully privileged dentist members who are licensed to practice in the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico or a dependency of the United States. ADA is a purely voluntary association.

ADA is interested in the issue of Federal Trade Commission jurisdiction over not-for-profit associations since the outcome of this case will determine whether the ADA can be subject to Federal Trade Commission jurisdiction.

Moreover, ADA has a direct stake in the outcome of this case because under the terms of the Agreement containing Consent Order[3] entered into between ADA and the Federal Trade Commission, the Commission will issue an Order against the ADA that will be identical to the final adjudicated Order entered against the American Medical Association, insofar as that Order relates to advertising by physicians.

Furthermore, the Federal Trade Commission and the ADA agreed that in the event the final adjudicated Order in the American Medical Association case dismisses the complaint against the American Medical Association on the merits or for lack of jurisdiction, the Federal Trade Commission shall dismiss its case against the ADA. Thus, the outcome of the instant case is of primary importance to the American Dental Association.

---

[2] Hereinafter "ADA Brief Amicus."

[3] The relevant portions of that Agreement appear at App. 4a-5a.

The American Dental Association respectfully submits this Brief Amicus Curiae in Support of Petitioners American Medical Association, Connecticut State Medical Society and New Haven County Medical Association, Inc.

II.

SUMMARY OF THE ARGUMENT

The Federal Trade Commission lacks jurisdiction over bona fide not-for-profit associations of professionals such as the American Medical Association and the American Dental Association. The relevant portions of the Federal Trade Commission Act only grant the Commission jurisdiction over a "corporation" "which is organized to carry on business for its own profit or that of its members." (15 U.S.C. §§ 44, 45). Profit must be read in its ordinary meaning. Thus, a corporation "organized" for profit is one that contemplates distributing dividends or other direct pecuniary gain to its members from its business operations. *See Community Blood Bank of Kansas City Area, Inc.* v. *Federal Trade Commission,* 405 F.2d 1011, 1017 (8th Cir. 1969). The American Dental Association distributes no such gains to its members and is in form and in fact a bona fide not-for-profit corporation.

The legislative history of the Federal Trade Commission Act reflects the fact that Congress merely intended the Commission to regulate industrial corporations engaged in interstate commerce. H.R. Rep. No. 533, 63d Cong., 2d Sess. 8 (1914). Nothing in the legislative history suggests that Congress intended to subject not-for-profit corporations composed of professionals to the jurisdiction of the Federal Trade Commission. In fact, Congress, having the jurisdictional gap brought to its attention, in 1977, specifically rejected an FTC sponsored

amendment to grant it jurisdiction over not-for-profit corporations. *See Proposed Federal Trade Commission Amendments of 1977 and Oversight: Hearings on H.R. 3816 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. (1977).

Enforcement of the Federal Trade Commission's Order in this case is not in the public interest. For many years, the internal regulations of the learned professions were assumed to be immune from the antitrust laws, an assumption that was shattered by this Court's decision in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975). Moreover, most states prohibited or severely restricted advertising by professionals (*See* App. 6a-8a), a practice that came to a sudden halt with this Court's decision in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977).

With these sudden changes in the law, the ADA conformed its ethical canons to comply with current law. These changes reflect good faith efforts to allow the dissemination of truthful information that will allow consumers to make informed choices about dental care while preventing patients from being deceived by the few unscrupulous practitioners who would resort to falsehoods. Accordingly, these ethical canons merely regulate and thereby promote competition. *Cf. National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 691 (1978).

Since the professions rapidly complied with the changing legal standards and since the law is now clear, there is not a cognizable danger that the pre-*Bates* ethical codes will be revived. *See United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953). Under these conditions, the issuance of an FTC order is an abuse of discretion and is not in the public interest.

III. ARGUMENT

THE LANGUAGE OF THE FEDERAL TRADE COMMISSION ACT PRECLUDES THE COMMISSION'S JURISDICTION OVER NON-PROFIT PROFESSIONAL ASSOCIATIONS

Sections 4 and 5 of the Federal Trade Commission Act, 15 U.S.C. §§ 44, 45 (1979), are the statutory bases upon which Federal Trade Commission jurisdiction over non-profit professional associations, such as the American Medical Association and the American Dental Association, is asserted.

Section 5(a)(6) of the Federal Trade Commission Act provides in pertinent part:

> The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

Accordingly, the Federal Trade Commission has jurisdiction only over "persons, partnerships, or corporations." A corporation is defined in Section 4 of the Federal Trade Commission Act to include only the following entities:

> any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, which is organized to carry on business for its own profit or that of its members.

On its face the statute does not grant the Commission jurisdiction over non-stock not-for-profit professional associations, which are not "organized to carry on business for [their] own profit or that of [their] members."

Congress is presumed to have used the critical word "profit" in its usual and well-settled sense. *United States* v. *Stewart*, 311 U.S. 60, 63 (1940); *Old Colony R.R. Co.* v. *Commissioner*, 284 U.S. 552 (1932). As this Court has repeatedly stated:

> A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. . . . Therefore, we look to the ordinary meaning of the term "bribery" at the time Congress enacted the statute in 1961. (*Perrin* v. *United States*, 444 U.S. 37, 42 (1979)).

Thus, the term "profit" as employed in the Federal Trade Commission Act is to be interpreted as taking its meaning as it was commonly understood in 1914.

The absence of any contrary direction in either the Act itself or the legislative history can be taken as Congress' satisfaction with and adoption of the then widely accepted definition of "profit" as related to not-for-profit corporations. *Morissette* v. *United States*, 342 U.S. 246, 263 (1952). *See also Burns* v. *Alcala*, 420 U.S. 575, 580-581 (1975). In fact, as hereinafter discussed, the legislative history demonstrates Congress' intention to use the term "profit" in a manner totally consistent with its common definition.

"Profit" has had a well known and widely accepted meaning in the law which Congress is presumed to have intended in the Federal Trade Commission Act. The traditional definition of "profit" within the context of

not-for-profit corporations is that in order for a corporation to be one organized for profit, there must be dividends or other pecuniary benefits contemplated to be paid to its members. This definition is universally accepted by the courts throughout the United States in determining whether entities are not-for-profit.[4]

The language of the Act demonstrates that Congress clearly intended the jurisdiction of the Federal Trade Commission Act to reach only traditional for-profit corporations and trade associations. Although this Court has held, without much discussion, that sham not-for-profit corporations are trade associations subject to the Federal Trade Commission's authority (*See, e.g., Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948)), the rationale for that position is found both in the legislative intent as discussed herein and in logic.[5]

---

[4] *See* ADA Brief Amicus at 6-7, 12-13.

[5] The dissenting opinion of Commissioner Elman in *Community Blood Bank of Kansas City Area, Inc.*, 70 F.T.C. 728, 948 (1966), which was cited with approval by the Eighth Circuit in *Community Blood Bank of Kansas City Area, Inc.* v. *Federal Trade Comm'n*, 405 F.2d 1011, 1019 (8th Cir. 1969), makes the case for this position as follows:

> In a number of cases, it is true, the Commission and the courts have refused to recognize any exemption from the Federal Trade Commission Act for nonprofit corporations employed by commercial enterprises as a medium or instrumentality to commit unfair practices. But, so far as I know, the only such corporations have been trade associations. Trade associations, which bring together firms having common business concerns, have often played a central role in boycotts, price-fixing conspiracies, and other unlawful conduct involving concert of action. *In such a case, piercing the nonprofit corporate veil and*

Therefore, to conclude that traditional non-profit corporations fall within the purview of the Federal Trade Commission would violate the plain and commonly understood language of the Federal Trade Commission Act.

The application of the proper interpretation of the Act's critical language, as rendered by the Eighth Circuit Court of Appeals in *Community Blood Bank of Kansas City Area, Inc.* v. *Federal Trade Comm'n*, 405 F.2d 1011 (8th Cir. 1969), clearly reveals that non-profit professional associations are not "organized to carry on business for [their] own profit or that of [their] members."

In *Blood Bank* the Commission brought an action against two non-profit corporations which argued that they were not subject to the Federal Trade Commission's jurisdiction because they were not "organized to carry on business for [their] own profit or that of [their] members." Relying upon several well-established principles of statutory construction and emphasizing the fact that the Sherman and Clayton Acts apply to *all* corporations, while the Federal Trade Commission Act is limited to profit-making corporations,[6] the court concluded that the test for jurisdiction is whether the non-stock corporations

---

[5] (Continued)

recognizing the trade association for what it is — a device by which individual profit-making concerns, for private gain, seek to restrain competition — does no violence to the Congressional design embodied in Sections 5(a)(6) *and* 4 *of the Federal Trade Commission Act; failure to pierce the veil, indeed, would elevate form over substance to an unreasonable degree, and lay the path to evasion of the Act wide open.* (Emphasis supplied; citations omitted; 70 F.T.C. at 949).

[6] *See* ADA Brief Amicus at 5-6.

"engaged in business for *profit* within the traditional and generally accepted meaning of the word." (Emphasis in original; 405 F.2d at 1017). The court stated:

> According to a generally accepted definition "profit" means gain from business or investment over and above expenditures, or gain made on business or investment when both receipts or payments are taken into account. (405 F.2d at 1017).

To clarify the definition of "profit," the court quoted the following language from the Supreme Court of Wisconsin:

> [w]hether dividends or other pecuniary benefits are contemplated to be paid to its members is generally the test to be applied to determine whether a given corporation is organized for profit. (405 F.2d at 1017, *quoting Associated Hospital Service, Inc.* v. *City of Milwaukee*, 13 Wis.2d 447, 109 N.W.2d 271 (1961)).

The language of the statute is manifest that in order for a corporation to be subject to Federal Trade Commission jurisdiction, profit-making must be its primary purpose. Congress gave the Commission jurisdiction over corporations "*organized*" for profit; it did not confer jurisdiction over corporations *which engage in any profit-making activity*. The Eighth Circuit in *Blood Bank* acknowledged this:

> [E]ngaging in business and making profits must be more than a subordinate or mere incidental characteristic of a corporation's existence for it to be considered one operated for profit. (405 F.2d at 1017).

The fact that profit-making must be more than an incidental aspect of a corporation to make it one organized for profit becomes more clear when one examines the facts in *Blood Bank*. The corporations themselves were non-

profit organizations, but some of the hospital members were in fact proprietary. 405 F.2d at 1020 n. 16. Moreover, the initial decision of the Hearing Examiner made it quite clear that the non-profit corporations did confer economic benefits upon their members.[7] Obviously, the requirements of Sections 4 and 5 of the Act are not satisfied by the determination that an organization may benefit its members in the broad sense of the word "profits."

The court in *Blood Bank* recognized that the mere fact that a corporation is in form non-profit does not prove that it is in fact a non-profit corporation. The Commission does have authority "to regulate so-called non-profit corporations, associations and all other entities if they are in fact profit-making enterprises." (405 F.2d at 1018). Therefore, *Blood Bank* permits an examination into the actual operation of the organization in order to determine whether it is a sham non-profit corporation *which actually is organized for profit.* However, this is by definition a limited inquiry, *i.e.,* was the non-profit corporation in fact "organized" for profit. (405 F.2d at 1019).

THE LEGISLATIVE HISTORY OF THE FEDERAL TRADE COMMISSION ACT PRECLUDES THE COMMISSION'S JURISDICTION OVER NON-PROFIT PROFESSIONAL ASSOCIATIONS

There is no legislative history suggesting that Congress intended the Federal Trade Commission to have jurisdiction over not-for-profit professional associations. *See* H. R. Rep. No. 533, 63d Cong., 2d Sess. (1914); S. Rep. No. 597, 63d Cong., 2d Sess. (1914); H. R. Rep. No. 1142, 63d Cong., 2d Sess. (1914). On the contrary, the legislative history demonstrates that the objective of the Federal Trade Commission Act was to control the traditional-

[7] *See* ADA Brief Amicus at 7-8.

ly commercial activities of corporations, and especially industrial corporations. Senator Newlands, the sponsor of the legislation, when he introduced a bill to create an interstate trade commission in 1911 observed:

> [T]here is a need of an independent, quasi-judicial, and administrative tribunal . . . for the continuous control of the big *industrial corporations* engaged in interstate trade. (Emphasis supplied; 47 Cong. Rec. 2620 (1911)).

Congressional hearings held in 1911 and 1912 essentially were concerned with the maner in which the government could regulate the basic commercial transactions of industrial corporations. *To Investigate and Report Desirable Changes in the Laws Regulating and Controlling Corporations, Persons, and Firms Engaged in Interstate Commerce: Hearings on S. Res. 98 Before the Senate Comm. on Interstate Commerce*, 62d Cong., 1st and 2d Sess. (1912).

Both the original Senate and House of Representatives versions of the bill to create the Commission were designed to give the Commission jurisdiction over commercial corporations. The House bill provided:

> "Corporation" means a body incorporated under law, and also joint-stock associations and all other associations having shares of capital or capital stock or *organized to carry on business with a view to profit.* (Emphasis supplied; H. R. Rep. No. 1142, 63d Cong., 2d Sess. 11 (1914)).

The Senate bill similarly provided:

> The term "corporation" or "corporations" shall include joint-stock associations and all other associations having shares of capital or capital stock, *organized to carry on business for profit.* (Emphasis supplied; S. Rep. No. 597, 63d Cong., 2d Sess. 1 (1914)).

The report of the House bill by the House Committee on Interstate and Foreign Commerce establishes that the Commission was originally intended to assist the Department of Justice in enforcing the Sherman Act and to supply information in order that Congress might embark on "future *regulation of industrial corporations* engaged in interstate and foreign commerce." (Emphasis supplied; H. R. Rep. No. 533, 63d Cong., 2d Sess. 6 (1914)). The committee stated:

> The whole theory of the creation of the commission has been to make it an efficient and useful independent body, concerned with the maintenance of proper supervisory relations of the Federal Government *over industrial corporations engaged in interstate commerce.* (Emphasis supplied; H. R. Rep. No. 533, 63d Cong., 2d Sess. 8 (1914)).

The need to regulate purely commercial enterprises was also recognized in the report of the Senate Committee on Interstate Commerce which accompanied the Senate bill. S. Rep. No. 597, 63d Cong., 2d Sess. (1914). The Senate bill was expressly designed to apply to trade associations as distinguished from those associations not engaged in traditionally commercial endeavors:

> Specifically subject to the jurisdiction of this commission are all corporations, *trade associations,* and corporate combinations engaged in interstate and foreign commerce. . . . (Emphasis supplied; S. Rep. No. 597, 63d Cong., 2d Sess. 11 (1914)).

The remarks of the senators during the floor debates regarding the Senate bill demonstrate Congress' purpose of regulating corporations engaged in commercial activities. Senator Newlands, sponsor of the bill, specifically referred to the power of the Commission over trade associa-

tions. (51 Cong. Rec. 11082 (1914)). Furthermore, he referred to the Commission's power to investigate "business and trade corporations." (51 Cong. Rec. 11083 (1914)). Senator Cummins, a supporter of the legislation to create the Commission, noted the Commission's jurisdiction over trade associations: "The entire bill relates to corporations, trade associations, and corporate combinations . . . ." (51 Cong. Rec. 11448 (1914)).

Prior to the eventual passage of the Federal Trade Commission Act, there was concern that the definition of "corporation" in neither the House nor the Senate version was broad enough to extend the Federal Trade Commission's jurisdiction to trade associations of manufacturers or dealers, several of which were organized as non-profit corporations. This opinion was voiced by Joseph E. Davies, Commissioner of the Bureau of Corporations, in an August 8, 1914 letter to Senator Newlands, Chairman of the Senate Committee on Interstate Commerce. *See Community Blood Bank of Kansas City Area, Inc.*, 70 F.T.C. 728, 905-906 (1966), *rev'd*, 405 F.2d 1011 (8th Cir. 1969). Commissioner Davies' recommended changes were eventually adopted by the conference committee and incorporated into the Act as the law presently appears. (H. R. Rep. No. 1142, 63d Cong., 2d Sess. 3 (1914)).

The change in the definitional language made by the conference committee and the debate on the conference report in both houses of Congress emphasize that the Act was only designed to reach traditionally commercial corporations, including trade associations, and not entities which may only be incidentally commercial in nature. Representative Covington, the House sponsor, stated: "The definitions respecting . . . corporations . . . remain substantially as in Section 4 of the House bill." (51 Cong. Rec. 14925 (1914)).

The statements of the Senate sponsor and two of the Senate conferees are consistent that the conference report in no way altered the Senate's previous intention that the Commission's jurisdiction extend only to commercial activities. Senator Cummins spoke of the fact that the substance of the bill was not disturbed by the conference committee despite changes in language:

> There are just two changes of real materiality in the bill . . . . The first is substituting the phrase "unfair methods of competition" for the phrase "unfair competition." In my judgment, these two phrases mean exactly the same thing.
>
> The next change is with respect to the procedure for a review of the order of the commission. (51 Cong. Rec. 14768 (1914)).

Senator Newlands confirmed this explanation of the effect of the conference bill:

> [U]pon comparing the conference report with the bill as it passed the Senate, [the conference report] varies from it in very few particulars. . . . [T]he substance of the bill is there, and almost the language of the bill. The substantial changes have been referred to by the Senator from Iowa [Senator Cummins] . . . . Whatever is in this bill was entirely within the range of difference between the Senate and the House, and can be found either in the one bill or in the other. (51 Cong. Rec. 14769 (1914)).

In addition, Senator Pomerene, another conferee, made the following statement:

> With the exception of section 5 [*i.e.* change to "unfair methods of competition"], I think there is nothing vital or substantial in any of the changes which were made by the conferees. (51 Cong. Rec. 14769 (1914)).

If the conference committee change in language was intended to include ordinary non-profit associations, such as the American Dental Association or the American Medical Association, then the change would have been "vital or substantial."

Therefore, it is clear that the drafters of the Federal Trade Commission Act intended the statute specifically to reach only commercial corporations, including trade associations, and not non-profit corporations.

THE FEDERAL TRADE COMMISSION HAS ACKNOWLEDGED ITS LACK OF JURISDICTION OVER NON-PROFIT PROFESSIONAL ASSOCIATIONS

Although the Federal Trade Commission has taken the position in this Court that it has jurisdiction over traditional not-for-profit corporations,[8] recent positions taken by the Commission lead to the conclusion that the Federal Trade Commission does not have such jurisdiction.

In 1977, the Federal Trade Commission advocated an amendment to the Federal Trade Commission Act which would have granted the Commission jurisdiction over non-profit corporations. *See Proposed Federal Trade Commission Amendments of 1977 and Oversight: Hearings on H. R. 3816 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 1st Sess. (1977) [hereinafter *1977 Hearings*]. As stated by Mr. Calvin J. Collier, then Chairman of the Federal Trade Commission:

> The bill [H. R. 3816] would make several changes in the jurisdiction of the Commission. In particular, it would: (1) Broaden the reach of the FTC Act by redefining "corporation" to include nonprofit corporations . . . . (*1977 Hearings* at 69).

---

[8] Brief in Opp. at 11.

Chairman Collier observed that the amendment was made necessary by the restrictive definition of "corporation" contained in Section 4 of the Federal Trade Commission Act:

> The existing definition of "corporation" has hindered Commission challenges to otherwise unlawful behavior by certain nonprofit corporations. (*1977 Hearings* at 69).

Finally, Chairman Collier testified that Federal Trade Commission jurisdiction may be absent when the Commission does not focus its attention on corporations organized for profit in the ordinary and traditional sense. *See 1977 Hearings* at 82. In other words, even according to then Chairman Collier, jurisdiction may be lacking when the Commission does not focus its attention on corporations organized for profit in the ordinary and traditional sense. This result appears to be precisely what Congress intended when it granted the Commission more limited jurisdiction than granted under the Sherman and Clayton Acts.[9]

The Committee on Interstate and Foreign Commerce of the House of Representatives, after hearing testimony on the amendment, deleted the proposed provision in the bill which would have closed the gap in the Commission's jurisdiction, noting the absence of jurisdiction over the health industry non-profit organizations under the current wording of Section 4 of the Federal Trade Commis-

---

[9] Indeed, Mr. Peter Kinzler, counsel to the subcommittee, suggested that the Commission's approach with reference to determining that a not-for-profit corporation is a sham for-profit corporation may have been improper under the Federal Trade Commission Act. *See 1977 Hearings* at 549.

sion Act. H. R. Rep. No. 339, 95th Cong., 1st Sess. 120 (1977).[10]

The position taken by the American Dental Association herein is not an argument for any exemption from the antitrust laws. After the decision by this Court in *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975), it is clear that certain activities of professional associations are subject to antitrust scrutiny. It is equally clear that Congress has the power to broaden FTC jurisdiction to include non-profit corporations. The issue here, however, is whether Congress intended the Federal Trade Commission's jurisdiction to reach traditional not-for-profit corporations. It is clear beyond cavil that Congress did not so intend.

ENFORCEMENT OF AN ORDER IN THIS MATTER IS NOT IN THE PUBLIC INTEREST

The Federal Trade Commission, in its haste to attack the outmoded and abandoned ethical precepts of the professions, including dentistry, has overlooked the historical context of the matter at issue. Prior to this Court's 1975 decision in *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975), "learned professions'" internal regulations were generally assumed to be beyond the scope of the

---

[10] Congress' position on Federal Trade Commission jurisdiction was reiterated by Mr. Alfred F. Dougherty, Jr,. former Director of the Commission's Bureau of Competition, in remarks which again demonstrate the absence of Commission jurisdiction over non-profit professional associations. *See* 312 Trade Reg. Rep. 2 (December 19, 1977):

> "Two problems presently impede FTC action. One is that the FTC Act lets the agency move only against for profit corporations . . . I can assure you the next time the matter is raised with Congress, these issues will be fully addressed." (312 Trade Reg. Rep. at 3-4).

antitrust laws. *Cf. Federal Baseball Club of Baltimore* v. *National League,* 259 U.S. 200, 209 (1922). This assumption was not merely one shared by the professions themselves. Prior to *Goldfarb,* the Federal Trade Commission had not ever brought a proceeding challenging the internal regulations of professional associations.

From this perspective, it is clear that *Goldfarb* was a legal departure that required professional associations to try to adapt their practices to the antitrust laws after years of assumed immunity. Not only was antitrust immunity assumed, virtually all states prohibited or severely restricted advertising by dentists. (*See Semler* v. *Board of Dental Examiners,* 294 U.S. 608 (1935); *See also* App. 6a-8a for a list of the relevant statutes). Thus ADA's advertising regulatory framework was consistent with state regulation of dentists' advertising. This Court's decision in *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977), of course had a profound impact on state advertising proscriptions.

ADA quickly conformed its conduct to the new regulatory climate. Initially, as ADA reviewed *Goldfarb,* ADA sent a letter to all constituent (state) and component (local) societies of the ADA urging them to exercise extreme caution in initiating any ethical discipline. After this initial showing of good faith, this Court decided *Bates.* At the next meeting of ADA's House of Delegates, ADA's legislative body passed two resolutions which automatically modified ADA's Principles of Ethics in order to bring them into compliance with *Bates.*[11]

[11] See House Resolutions, 71 H and 72 H, passed October, 1977, App. 9a.

The effect of these resolutions, which by operation of ADA's Constitution and By-laws automatically bound all constituent and component societies, was to allow the dentists to advertise without fear of ethical sanction as long as the advertising was not false, deceptive, misleading, or fraudulent.

ADA has now thoroughly revised its Principles of Ethics and Code of Professional Conduct in order to make it absolutely clear that the only prohibited advertising is that which is "false or misleading in any material respect."[12]

The foregoing demonstrates that this is not the usual antitrust case involving an intention to injure competition. The law was swiftly changing, so swiftly that the most restrictions on advertising were found in state statutes. The mood of the country changed; advertising, which was considered by all the professions to be unethical, now was found to be helpful in advancing professional services. To argue that the legal, medical and dental professions were common antitrust conspirators is nonsensical. The law changed, and professional associations' ethical codes now conform and therefore enforcement of an order in this matter is no longer in the public interest.

In *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953), this Court stated that:

> . . . the moving party must satisfy the Court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.

---

[12] *See* ADA's Principles of Ethics and Code of Professional Conduct, App. 10a.

See also United States v. *Oregon State Medical Society,* 346 U.S. 326, 333 (1952) (there must exist "some danger of recurrent violation"). *W.T. Grant* was a case brought to enjoin a violation of § 8 of the Clayton Act, 15 U.S.C. § 19, which forbids interlocking directorates. The Court found no need for relief because the individual in question had resigned from the corporate boards and had no intention of violating the Act. In *Oregon State Medical Society,* the defendant had abandoned its initial philosophical opposition to prepaid medical care. Similarly, in this case, it is an abuse of discretion to issue an Order when the forbidden conduct will not be repeated and respondents' earlier, pre-*Bates* ethical standards by no means "predict the shape of things to come." (343 U.S. at 333).

It can be noted that the FTC did in fact take this practical approach with the American Veterinary Medical Association. The AVMA investigation was closed because AVMA had voluntarily eased its restrictions. *See* 3 Trade Reg. Rep. (CCH) ¶ 10,439 (1981). Nevertheless, the Commission in this matter insists upon an Order that ". . . merely requires the Association to do what it is doing anyway and prohibits it from doing what it is not doing." *American Medical Ass'n* v. *FTC,* 638 F.2d 443, 454 (2d Cir. 1980).

An unnecessary order is particularly unfortunate policy in the context of non-profit, professional associations such as the respondents whose basic objectives are scientific and educational. Litigation with the Commission is, in itself, financially debilitating. The ADA has, since entry of its consent decree, been required to undertake annually the burden of reporting to the FTC about compliance. *See* 94 F.T.C. 403, 412 (1979). Under the AMA's order, it will then be required to report to the FTC for

another five years and to allow the FTC virtually unlimited access to its files. *See* 94 F.T.C. at 1040 (1979).

THE BURDEN SHOULD NOT BE ON THE ADA TO PETITION THE COMMISSION TO LIFT ITS UNNECESSARY ORDER

In its Brief In Opposition to Respondents' Petition for a Writ of Certiorari, the FTC perhaps admitted that the Order is now unnecessary, stating that "[w]e note, however, that once the Commission's Order becomes final and effective (See 15 U.S.C. §45(g)), petitioners may, if they wish, request the Commission to reconsider its Order on the ground that conditions have changed." (Brief in Opp. pp. 21-22).

Conditions have changed, and the Order, insofar as it relates to advertising by physicians, should not be enforced. Neither the ADA nor the petitioners should be required to go to the additional expense of petitioning the Commission to dismiss the Order. The Commission has already forced ADA to engage in one unnecessary round of litigation. It is less than responsible to suggest another round of litigation and this is precisely what the FTC suggests, since the Federal Trade Commission Improvements Act of 1980 (15 U.S.C. §45g)) is expressly appealable to the Courts of Appeals. This Court should not sanction a continued waste of judicial resources.

CONCLUSION

By reason of the foregoing, the American Dental Association respectfully requests that the decision of the Second Circuit Court of Appeals be reversed insofar as that decision relates to jurisdiction or to advertising by physicians.

Respectfully submitted,

PETER M. SFIKAS
200 East Randolph Drive
Suite 7300
Chicago, IL 60601
(312) 861-1400
Counsel of Record

Of Counsel
CLAY H. PHILLIPS
JOHN N. SCHOLNICK
PETERSON, ROSS, SCHLOERB & SEIDEL
200 East Randolph Drive
Suite 7300
Chicago, IL 60601
(312) 861-1400

September 4, 1981

APPENDIX

In The

SUPREME COURT OF THE UNITED STATES

No. 80-1690

AMERICAN MEDICAL ASSOCIATION, CONNECTICUT STATE MEDICAL SOCIETY, and NEW HAVEN COUNTY MEDICAL ASSOCIATION, INC.,

Appellants,

v.

FEDERAL TRADE COMMISSION,

Appellee.

CONSENT

On behalf of the American Medical Association, the undersigned hereby consents, pursuant to Rule 36 of the Rules of the Supreme Court, to the filing of a Brief Amicus Curiae on behalf of the American Dental Association in the above-captioned matter.

/s/ Sidley & Austin
Sidley & Austin
On Behalf of the American
Medical Association

DATED: July 23, 1981

In The

SUPREME COURT OF THE UNITED STATES

No. 80-1690

AMERICAN MEDICAL ASSOCIATION, CONNECTICUT STATE MEDICAL SOCIETY, and NEW HAVEN COUNTY MEDICAL ASSOCIATION, INC.,

Appellants,

v.

FEDERAL TRADE COMMISSION,

Appellee.

CONSENT

On behalf of the Connecticut State Medical Society and the New Haven County Medical Association, Inc. the undersigned hereby consents, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, to the filing of a Brief Amicus Curiae on behalf of the American Dental Association in the above-captioned matter.

/s/ Linda L. Randell of
Wiggin & Dana
On Behalf of the Connecticut Medical Society and the New Haven County Medical Association, Inc.

DATED: July 28, 1981

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

July 28, 1981

Peter M. Sfikas, Esq.
Peterson, Ross, Schloerb & Seidel
Suite 7300
200 East Randolph Drive
Chicago, Illinois 60601

Re: American Medical Association, et al. v. FTC, No. 80-1690

Dear Mr. Sfikas:

As requested in your letter of July 22, 1981, I hereby consent to the filing of a brief *amicus curiae* on behalf of the American Dental Association.

Yours sincerely,

/s/ Lawrence G. Wallace
Lawrence G. Wallace
Acting Solicitor General

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of
AMERICAN DENTAL ASSOCIATION,
a corporation,
INDIANA DENTAL ASSOCIATION,
a corporation,
INDIANAPOLIS DISTRICT DENTAL SOCIETY,
a corporation,
VIRGINIA DENTAL ASSOCIATION,
a corporation, and
NORTHERN VIRGINIA DENTAL SOCIETY,
a corporation.

DOCKET NO. 9093

AGREEMENT CONTAINING CONSENT
ORDER TO CEASE AND DESIST

• • • •

I

IT IS ORDERED that:

(A) On entry of a final adjudicated order in FTC Docket No. 9064, the Commission will issue an order ("*ADA* order") against respondents in this proceeding which will consist of the provisions of the FTC Docket No. 9064 final adjudicated order, conformed to make such provisions fully applicable to respondents herein, consistent with Section I(C) of this Order. Such conforming modifications will include, for purposes of illustration, but not be limited to, substituting the names of respondents and their ethical codes and publications for the names of the FTC Docket No. 9064 respondents and their ethical codes and publications, respectively, and substituting the words "dental" for "medical", "dentists" for

"physicians", and "dentists' services" for "physicians' services". Respondents shall be bound by such *ADA* order and shall have no right to seek judicial review or otherwise challenge the validity of it unless it fails to conform substantially to the final adjudicated order in FTC Docket No. 9064, consistent with Section I(C) of this Order, provided however:

(B) In the event that the Commission issues a decision and order based on a consent agreement against the American Medical Association in FTC Docket No. 9064, the instant case shall immediately be reopened and returned to adjudicative status.

(C) No provisions in the final adjudicated order in FTC Docket No. 9064 which relate directly to physicians' contractual arrangements for the sale or distribution of their professional services or to the growth, development or operations of any prepaid health care delivery plan or of any other organization which offers physicians' services to the public shall be applicable to respondents, except to the extent that such provisions relate to advertising or solicitation of patients or business.

(D) In the event that the final adjudicated order in FTC Docket No. 9064 dismisses the complaint on the merits or for lack of jurisdiction, the Commission shall dismiss the complaint in this proceeding.

(E) For the purpose of clarifying Section I(A) of this Order, respondents shall not be bound by any order entered pursuant to Section I(A) of this Order based on an order of the Commission or a reviewing court which may be entered in FTC Docket No. 9064 unless and until such Docket No. 9064 order becomes a final adjudicated order.

• • • •

The following statutes limited dental advertising at the time this Docket No. 9093 was filed in January of 1977:

Code of Alabama, Tit. 34, Ch. 9, §§34-9-18, 34-9-19, 34-9-20 (1977);

Alaska Statutes, Tit. 8, Ch. 36, §08.36 310 (1973);

Arizona Revised Statutes, Tit. 32, Ch. 11, §§32-1201, 32-1263 (1976-77 Supp.);

Arkansas Statutes Annotated, Tit. 72, Ch. 5, §§72-544 and 72-560 (1975 Supp.);

California Code Annotated, Business and Professions, Ch. 4, §§1680 and 1701 (West Supp. 1976);

Colorado Revised Statutes, Tit. 12, Art. 35, §12-35-118 (1974 and 1975 Cum.Supp.);

Connecticut General Statutes Anno., Tit. 20, Ch. 379, §20-114 (1969);

Delaware Code Anno., Tit. 24, Ch. 11, §§1131 and 1132 (1974);

District of Columbia Code Encyclopedia, Tit. 2, Ch. 3, §2-311 (1965);

Florida Stats. Anno., Tit. 30, Ch. 466, §§466.24, 466.27 (1965);

Code of Georgia Anno., Ch. 84-7, §84-724 (1976 Cum. Docket Part);

Illinois Anno. Stats., Ch. 91, §§62(17), 72(b) (1966);

Burns Indiana Stats., Tit. 25, Ch. 1, §§25-14-1-19 (1974);

Iowa Code Anno., Tit. 8, Ch. 153, §153.32 (1972);

Kansas Stats. Anno., Ch. 65, Art. 14, §§65-1436, 65-1437, 65-1439 (1972);

Kentucky Rev. Stats., Ch. 313, §§313.130, 313.140 (1972), §313.240 (1974 Cum.Supp.);

Louisiana Rev. Stats., Tit. 37, Ch. 9, §775 (1974);
Maine Rev. Stats. Anno., Tit. 32, Ch. 15, §1091 (1964);
Anno. Code of Maryland, Art. 32, §§11, 12 (1957) and §16 (1976) (Supp.);
Anno. Laws of Massachusetts, Ch. 112, §52A (1975);
Michigan Stats. Anno., Vol. 10, Ch. 122, §14.629(18) (1976 Cum.Supp.);
Minnesota Stats. Anno., Ch. 150, §150A.11 (1970);
Mississippi Code Anno., Tit. 73, Ch. 9, §61 (1972 Cum.Supp.);
Vernon's Anno. Missouri Stats., Tit. 22, Ch. 332, §§332.068, 332.160, 332.480 (1966);
Rev. Code of Montana, Tit. 66, Ch. 9, §§66-913, 66-17 (1975 Supp.);
Rev. Stats. of Nebraska, Ch. 71, Art. 1, §§71-147-71-148 (1971);
Nevada Rev. Stats., Tit. 54, Ch. 631, §631.050 (1973);
New Hampshire Rev. Stats. Anno., Ch. 317, §317-A: 17 (1975 Supp.);
New Jersey Stats. Anno., Tit. 45, Ch. 6, §45: 6-7 (1978);
New Mexico Stats. Anno., Ch. 67, Art. 4, §67-4-13 (1974);
McKinney's Consolidated Laws of New York, 16 Educ. Law §6509 (1972);
Gen. Stats. of North Carolina, Ch. 90, Art. 2, §90-41 (1975);
North Dakota Century Code Anno., Tit. 43, §§43-28-18, 43-28-25 (1960);

Baldwin's Ohio Rev. Code, Tit. 47, Ch. 4715, §§4715.-18, 4715.30 (1975 Cum. Issue);
Oklahoma Stats. Anno., Tit. 59, Ch. 7, §§328.28, 328.-31, 328.32, 328.50 (1971);
Oregon Rev. Stats., Tit. 52, Ch. 679, §679.140 (1975);
Purdon's Pennsylvania Stats. Anno., Tit. 63, Ch. 4, §122(i) (1968);
Gen. Laws of Rhode Island, Tit. 5, Ch. 31, §§5-31-8, 5-31-9 (1976);
Code of Laws of South Carolina, Tit. 40, Ch. 15, §40-15-190 (1977);
South Dakota Codified Laws, Tit. 36, §§36-6-28, 36-6-29, 36-6-29.1 (1977);
Tennessee Code Anno., Tit. 63, Ch. 5, §63-554 (1976);
Vernon's Texas Civ. Stats., Tit. 71, Ch. 9, Art. 4548(f) and 4548(g) (1976);
Utah Code Anno., Tit. 58, Ch. 7, §58-7-7 (1974);
Vermont Stats. Anno., Tit. 26, Ch. 13, §809 (1975);
Code of Virginia, 1950, Tit. 54, Ch. 81, §54-187 (1975 Supp.);
Rev. Code of Washington Anno., Tit. 18, Ch. 18.32, 18.32.290 (1978);
West Virginia Code, Ch. 30, Art. 4, §30-4-7 (1971);
Wisconsin Stats. Anno., Tit. 40A, Ch. 447, §447.07 (1974);
Wyoming Stats., Tit. 33, Ch. 15, §33-15-112 (1975).

ADA House Resolutions 71 H and 72 H read as follows:

71 H. *Resolved,* that constituent and component societies of the American Dental Association should immediately cease initiation of any disciplinary proceedings against any members who only advertise in the public press the availability of their services and the fees which they would charge for routine dental procedures.

72 H. *Resolved,* that dentists who advertise their services and fees in a manner that is consistent with the decision of the United States Supreme Court in the case of *Bates, et al.* v. *State Bar of Arizona,* if otherwise acceptable for membership, should now be regarded as eligible for admission to membership in the American Dental Association and its constituent and component societies.

ADA's Principles of Ethics and Code of Professional Conduct provides, in relevant part:

> **Although any dentist may advertise, no dentist shall advertise or solicit patients in any form of communication in a manner that is false or misleading in any material respect.**